

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

GTE Telephone Operating Companies)

Revisions to Tariff F.C.C. No. 1)

Transmittal Nos. 873, 874, 893
CC Docket No. 94-81

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GTE REBUTTAL TO OPPOSITION AND REPLY COMMENTS

GTE Service Corporation, on behalf of its
affiliated GTE Telephone Operating
Companies and GTE California Incorporated

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TABLE OF CONTENTS

	<u>PAGE</u>
SUMMARY	iii
INTRODUCTION	1
 <u>FACTUAL ISSUE 1</u>	
Is GTECA's transfer of investment from unregulated to regulated accounts reasonable?.....	2
GTECA'S PROPOSED TRANSFER OF INVESTMENT FROM UNREGULATED TO REGULATED ACCOUNTS IS REASONABLE, IN ACCORDANCE WITH THE COMMISSION'S RULES AND WILL INSURE THAT ONLY THE USERS OF THE CERRITOS VIDEO NETWORK WILL BEAR ITS COSTS.....	2
 <u>FACTUAL ISSUE 2</u>	
Are the rates and terms proposed in Transmittal Nos. 873 and 893 reasonable?.....	6
THE TARIFF RATES, TERMS AND CONDITIONS SET FORTH IN TRANSMITTAL NOS. 873 AND 893 ARE REASONABLE.	6
 <u>FACTUAL ISSUE 3</u>	
Under Transmittal Nos. 873 and 893, will the relationship between GTECA and Apollo be exclusively a "carrier-user" relationship, apart from the effects of Robak's role in construction, as required by Section 63.54 of the Commission's Rules?	6
GTECA SHOULD BE PERMITTED TO MAINTAIN THE CURRENT SUB-LEASE AND DECODER ARRANGEMENTS WITH APOLLO.	6
 <u>LEGAL ISSUE 1</u>	
Does the Court of Appeals' stay of the <i>Remand Order</i> continue the Section 214 authorization in effect until judicial review is complete, or does the authorization terminate on July 18, 1994?.....	7

GTECA HAS SECTION 214 AUTHORITY TO CONTINUE TO PROVIDE VIDEO CHANNEL SERVICE TO APOLLO AND SERVICE CORP. AFTER JULY 17, 1994.....	7
---	---

LEGAL ISSUE 2

Is it lawful for GTECA to supersede the Apollo contracts with the tariff filings in Transmittal Nos. 873 and 893?	9
---	---

GTECA'S TRANSMITTAL NOS. 873 AND 893 LAWFULLY ABROGATE ANY PRE-EXISTING CONTRACTS PRIVATELY NEGOTIATED FOR GTECA'S CARRIAGE OF APOLLO'S VIDEO SIGNALS IN CERRITOS.....	9
--	---

A. Introduction.	9
-----------------------	---

B. <i>Armour Packing</i> and Its Progeny Clearly Apply to the Instant Case.	11
--	----

C. Apollo's Attempt to Have the Commission Reject Years of Precedent and Apply the Substantial Cause Test to the Instant Case Is Without Merit.	14
--	----

D. Apollo Has Not Disputed That the Tariff Substantially Improves Its Position Because Maintenance Is Now Provided Free of Charge.	17
---	----

CONCLUSION.....	18
-----------------	----

SUMMARY

The record to date is clear – GTECA's conversion of its contractual relationships in Cerritos to a tariffed common carrier service lawfully abrogated the private agreements and properly brought GTECA and Apollo into compliance with the Commission Rules and Title II of the Act. The Ninth Circuit Court of Appeals' two stay orders confirm that the Section 214 authority granted to GTECA by the Commission in 1989 remains in place. GTECA possesses the legal authority to continue video channel service operations in Cerritos pursuant to its effective tariffs.

GTECA has demonstrated that its tariff terms and conditions are just and reasonable and accurately reflect its common carrier obligations in Cerritos. To insure equitable and nondiscriminatory treatment of both customers of the Cerritos video network, tariffed charges reflect both the value of the system, as reflected in the Lease Agreements, and its underlying costs. Thus, it is entirely reasonable to allow the transfer of the Cerritos assets to regulated accounts at an adjusted net book value as proposed in GTECA's Petition for Waiver.

There is no basis, either in law or in fact, to reject the Cerritos video channel service tariffs. GTECA's filing of the tariff for video channel service was designed to bring the pre-existing contractual agreements into a compliance with the Act and the Commission's Rules. It has done so. Parties submitting comments in response to the factual and legal issues set for investigation by the Bureau have provided no credible argument that GTECA should be required to discontinue or significantly alter its tariffed arrangements in Cerritos. To do so would imperil GTECA's continued service to the Cerritos community. The Commission should properly approve GTECA's proposed

transfer of the Cerritos assets into regulated accounts and should conclude its investigation into GTECA's video channel service tariffs.

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GTE REBUTTAL TO OPPOSITION AND REPLY COMMENTS

GTE Service Corporation (Service Corp.), on behalf of its affiliated GTE Telephone Operating Companies (GTOCs) and GTE California Incorporated (GTECA), hereby submit this Rebuttal to the Opposition of Apollo CableVision, Inc. (Apollo) and Reply Comments to the comments filed by Apollo, MCI Telecommunications Corp. (MCI), the National Cable Television Association and the California Cable Television Association (NCTA/CCTA) in accordance with the investigation instituted by the Common Carrier Bureau's (Bureau's) Order, DA 94-784, released July 14, 1994 (July 14, 1994 Order).

INTRODUCTION.

GTECA has demonstrated its legal authority to continue video channel operations in Cerritos. GTECA has justified the reasonableness of its tariff submissions and its proposal to assign the Cerritos investments into regulated accounts in both its Direct Case submitted on August 15, 1994 and Comments filed on September 15, 1994. No substantial or persuasive new arguments have been presented in the most recent submissions of Apollo, NCTA/CCTA, or MCI concerning the legal and factual issues set for investigation in this proceeding. The Commission should now properly

approve GTECA's proposed transfer of the Cerritos assets into regulated accounts such that the tariffed charges may recover the underlying costs of the network in a nondiscriminatory manner and conclude the investigation into GTECA's video channel service tariffs. Since Transmittal Nos. 873 and 893 have lawfully abrogated all inconsistent pre-existing agreements, the Commission should also properly conclude this investigation as soon as practicable.

FACTUAL ISSUE 1

Is GTECA's transfer of investment from unregulated to regulated accounts reasonable?

GTECA'S PROPOSED TRANSFER OF INVESTMENT FROM UNREGULATED TO REGULATED ACCOUNTS IS REASONABLE, IN ACCORDANCE WITH THE COMMISSION'S RULES AND WILL INSURE THAT ONLY THE USERS OF THE CERRITOS VIDEO NETWORK WILL BEAR ITS COSTS.

On June 13, 1994, GTECA filed a Petition for Waiver and Authority to Reallocate Investment from Nonregulated to Regulated Use (Petition for Waiver). GTECA's request to transfer the Cerritos assets into regulated accounts was necessary given the conversion of the private video transport agreements to a tariffed common carrier service. In its Direct Case, GTECA provided detailed account data on the Cerritos investments in accordance with the requirements of the July 14, 1994 Order (at ¶ 45). See GTE Direct Case, Attachment A. Only MCI has addressed GTECA's Direct Case showing (at 6-10) that the proposed transfer of investment from unregulated to regulated accounts is reasonable and in accordance with the Commission's Rules.

MCI contends that it is premature to allow GTECA to transfer the Cerritos investment into regulation because it is uncertain whether GTECA will be permitted to continue to offer the service to Service Corp. until the United States Court of Appeals

for the Ninth Circuit rules on GTECA's petition for review of the Commission's *Remand Order*.¹ MCI Comments, at 2, 5. The possibility that the Court may, or may not, rule in GTECA's favor at some point in the future provides no basis for rejection of GTECA's Petition for Waiver. GTECA currently possesses the legal authority to provide video channel service to Service Corp. pursuant to the Court's Stay Order and GTECA's effective tariff. See GTOC Transmittal No. 909. As long as GTECA's service offering and rates remain subject to Title II jurisdiction, its underlying costs must be included in the regulated ratebase.

The video programming ban has been held unconstitutional by three federal district courts,² and constitutionality of Section 533(b) is currently before the Court of Appeals, which is specifically considering Service Corp.'s provision of video programming. In addition, the repeal of the ban has been recommended to Congress by the Commission. *Video Dialtone Order*, 7 FCC Rcd at 5847. Given these facts, it is more likely than not that GTE will prevail in its efforts to provide video programming directly to subscribers in the near term. Even assuming, arguendo, that Service Corp. might not be allowed to provide programming at some time in the future, GTECA still will not permit half of the Cerritos video network to remain unused. It is in the best interest of both GTECA and the residents of Cerritos for GTECA to offer capacity to other programmers, even if Service Corp. is no longer allowed to be a programmer.

¹ *In re General Telephone Co. of California*, 8 FCC Rcd 8178 (1993), *app. pending sub nom. GTE California, Inc. v. Federal Communications Commission*, No. 93-70924 (9th Cir.).

² *Chesapeake & Potomac Telephone Co. v. United States*, 830 F.Supp. 909 (1992), *app. pending sub nom. Bell Atlantic v. United States*, No. 93-2340 (4th Cir.); *U S West, Inc. v. United States*, 855 F.Supp. 1184 (W.D. Wash. 1994), *app. pending* No. 94-35775 (9th Cir.); *BellSouth Corp. v. Federal Communications Commission*, No. CV 93-B-2661-S, Memorandum Opinion and Order (N.D. Ala., Sept. 23, 1994).

Charges for such capacity will be designed to fully recover all costs assigned to regulated accounts in accordance with the Commission's Rules; therefore, no other ratepayers could or would bear the costs of the Cerritos video network.

MCI also claims that GTECA's Petition for Waiver cannot be granted because the issue of whether GTECA will be permitted to convert the private agreements to tariff offerings is unresolved. MCI Comments, at 4. However, the question of whether GTECA must file tariffs is not at issue in this proceeding,³ only whether such tariffs may contain provisions that necessarily differ in some respects from those contained in the contracts. With the expiration of the waiver on July 17, 1994, the parties have been required to come into compliance with Title II of the Act and the Commission's Rules. It is clear that such compliance requires GTECA to convert the contractual arrangements to common carriage offerings in accordance with filed tariffs. *E.g., MCI Telecommunications Corp. v. American Tel. & Tel. Co.*, __ U.S. __, 114 S.Ct. 2223, 2231 (1994) (*MCI v. AT&T*); *In re United Video, Inc.*, 49 FCC 2d 878, 878 (1974), *recon. denied*, 55 FCC 2d 516 (1975). In its July 14, 1994 Order (at ¶ 33), the Bureau properly ruled that the common carriage issue did not warrant investigation.

Contrary to MCI's accusations, access ratepayers are not at risk of funding the Cerritos video network plant. MCI Comments, at 3. As long as GTECA complies with the Commission's Rules so that the rates paid by Service Corp. for its lease of 39 channels recover the underlying costs, no other ratepayer can be harmed. This was clearly demonstrated in the supporting information provided under Transmittal No. 874. As long as there are paying users on the system, none of the costs to support video

³ See *infra*, at 9-17.

channel services will be borne by access ratepayers such as MCI. The Commission could insure continued use, and full cost recovery, of the Cerritos video network by simply allowing Service Corp. to continue to provide to Cerritos residents the video services that they demand.

MCI (Comments, at 5) continues to claim that the regulated treatment of the Cerritos accounts will result in potential lower formula adjustments to GTECA's price cap indices. GTECA does not consider the video channel services provided in Cerritos to be subject to the Commission's price cap rules and, consequently, will not include any Cerritos cost or demand data in the development of GTECA's price cap indices. As an excluded service, the associated costs and revenues will not be included in the calculation of any lower formula adjustments.

MCI implies that GTECA has failed to provide a "meticulous showing of nonregulated asset valuation". MCI Comments, at 8. Quite the opposite is true. GTECA has been very straight-forward and forthcoming concerning the identification and reporting of assets and expenses for its Cerritos operations over the past five years. GTECA has filed periodic reports with the Commission and the Commission's staff has conducted audits of GTECA's accounting and financial records. The cost data submitted under the Transmittal Nos. 873 and 874, as well as the additional data submitted in the Direct Case, are factual and correct and reflect the net book value of assets as of July 1, 1994.

The method proposed in GTECA's Petition for Waiver for reassigning investment to regulated accounts reasonably reflects the characteristics of the Cerritos lease agreements and operations. Apollo and Service Corp. both agreed to specific lease prices for use of the coaxial network; prices which presumably would allow these

customers to successfully operate in the video distribution market. The filing of the tariff for video channel service was designed to bring the parties into compliance with the Act and the Commission's Rules. To insure equitable and nondiscriminatory treatment of both customers, tariffed charges reflect both the value of the system, as reflected in the Lease Agreements, and its underlying costs. Thus, it is entirely reasonable to allow the transfer of the Cerritos assets to regulated accounts at an adjusted net book value as proposed in the Petition.

FACTUAL ISSUE 2

Are the rates and terms proposed in Transmittal Nos. 873 and 893 reasonable?

THE TARIFF RATES, TERMS AND CONDITIONS SET FORTH IN TRANSMITTAL NOS. 873 AND 893 ARE REASONABLE.

Only Apollo has addressed this factual issue, and exclusively in the context of Legal Issue 2 (whether it is lawful for GTECA to supersede the Apollo contracts with Transmittal Nos. 873 and 893). GTECA therefore replies to Apollo's contentions *infra* at pages 9-17, under Legal Issue 2.

FACTUAL ISSUE 3

Under Transmittal Nos. 873 and 893, will the relationship between GTECA and Apollo be exclusively a "carrier-user" relationship, apart from the effects of Robak's role in construction, as required by Section 63.54 of the Commission's Rules?

GTECA SHOULD BE PERMITTED TO MAINTAIN THE CURRENT SUB-LEASE AND DECODER ARRANGEMENTS WITH APOLLO.

No party has disputed GTECA's Direct Case showing (at 16-19) that GTECA's sublease of facilities space from Apollo and GTECA's provision of cable converter

(decoder) equipment on a common carrier basis reflect permissible "carrier-user" relationships between Apollo and GTECA. More importantly, the termination or alteration of these existing relationships could result in disruption or rearrangement of service configurations for local subscribers in Cerritos. GTECA should therefore be permitted to maintain these arrangements with Apollo.

LEGAL ISSUE 1

Does the Court of Appeals' stay of the *Remand Order* continue the Section 214 authorization in effect until judicial review is complete, or does the authorization terminate on July 18, 1994?

GTECA HAS SECTION 214 AUTHORITY TO CONTINUE TO PROVIDE VIDEO CHANNEL SERVICE TO APOLLO AND SERVICE CORP. AFTER JULY 17, 1994.

As set forth more fully in GTE's Direct Case (at 20-24) and Comments (at 3-5), GTECA continues to provide service to Apollo and Service Corp. in accordance with the permanent Section 214 authority granted by the Commission in 1989 in the *Cerritos Order*. This authority not only survives expiration of the five year waiver on July 17, 1994, but the Court of Appeals' two stay orders (January 5, 1994 and September 7, 1994) confirm that this authorization remains in place until the Court rules on GTECA's constitutional challenge. Only NCTA/CCTA contend otherwise.

NCTA/CCTA's contentions have been fully briefed and responded to by GTECA in this proceeding and before the Court of Appeals. However, in their Reply Brief (at 2, n. 3), NCTA/CCTA perplexingly allege that the Court's September 7, 1994 Order is somehow "premised" on the fact that GTECA had "temporary" Section 214 authority until September 12, 1994 pursuant to the Bureau's July 14, 1994 Order (§ 12). Thus, NCTA/CCTA reason, this Stay Order is effective only until expiration of GTECA's "temporary" 214 authority on September 12, 1994.

Quite obviously, NCTA/CCTA's most recent leaps of logic do not pass muster. Such a reading of the Court's Order would truly mean the Court engaged in an utterly meaningless act. Under NCTA/CCTA's formulation, the Court stayed rejection of Transmittal No. 874 only until GTECA's Section 214 authority expired on September 12, 1994. However, the Bureau's July 14, 1994 Order *already* stayed rejection of Transmittal No. 874 until September 12, 1994. Therefore, the Court's Order would have been wholly superfluous -- a truly meaningless act.

In reality, GTECA never suggested -- to the Court or anyone else for that matter -- that its Section 214 authority was limited to that granted in the Bureau's July 14, 1994 Order. On the contrary, GTECA has always made clear that it has permanent Section 214 authority on the basis of the *Cerritos Order* itself. *E.g.*, GTECA Motion for Stay, December 17, 1993, at 13, n. 13, 16; GTECA Reply Brief, August 22, 1994, at 2; GTECA Supplemental Brief, July 28, 1994, at 1-7; GTECA Motion for Stay, August 22, 1994, at 5; GTECA Reply Brief on Motion for Stay, September 6, 1994, at 6, n. 7. Nor did GTECA's Motion *ever* request that the stay somehow should be limited until such time as the "temporary" 214 authority set forth in the July 14, 1994 Order would expire on September 12, 1994. The footnote in GTECA's Motion Reply Brief upon which NCTA/CCTA rely (GTECA Reply Brief of Motion for Stay, September 6, 1994, at 7, n. 8) merely noted the bewildering argument previously advanced by NCTA/CCTA that even during the 60 day "transition" period, GTECA *still* did not have Section 214 authority. *See* NCTA Opp. to Motion for Stay, at 6 ("GTE currently has no operating authority in Cerritos and has not requested any"). Unsurprisingly, the Court gave no credence to NCTA/CCTA's hyperbole and swiftly entered a second stay order.

In consequence, "pending further order of th[e] court", the *status quo* in Cerritos – including GTECA's underlying Section 214 authority – "remain[s] in effect."

September 7, 1994 Stay Order, at 1.

LEGAL ISSUE 2

Is it lawful for GTECA to supersede the Apollo contracts with the tariff filings in Transmittal Nos. 873 and 893?

GTECA'S TRANSMITTAL NOS. 873 AND 893 LAWFULLY ABROGATE ANY PRE-EXISTING CONTRACTS PRIVATELY NEGOTIATED FOR GTECA'S CARRIAGE OF APOLLO'S VIDEO SIGNALS IN CERRITOS.

A. Introduction.

Apollo now concedes, as it must, that GTECA is required to provide video signal transport only in accordance with the terms and conditions of a properly filed tariff. Apollo Opp., at 9, n. 7 ("Apollo does not argue here that a tariff must not be filed."); *see also MCI Telecommunications Corp. v. American Tel. & Tel. Co.*, *supra*, 114 S.Ct. at 2231. Thus, the only issue pending before the Commission is whether the rates, terms and conditions set forth in Transmittal Nos. 873 and 893 are just and reasonable. 47 U.S.C. §§ 201(b), 204(a)(1). They are.

Contrary to Apollo's contention, GTECA has never asserted that under the applicable *Armour Packing*⁴ rule that GTECA has "unfettered discretion in formulating [the] tariff." Apollo Opp. , at 2. Rather, in this case, GTECA specifically designed the tariff in order to bring the parties into compliance with (1) Section 203(a) of the Act, (2) Section 63.54's carrier-user limitation, and (3) Section 61.38's pricing rules. GTE

⁴ *Armour Packing Co. v. United States*, 209 U.S. 56 (1908).

Comments, at 9, 11. Since bringing the parties into compliance necessarily alters their pre-existing contractual relationship, this is precisely the type of situation which the *Armour Packing* rule was designed to reach. While Transmittal Nos. 873 and 893 thus alter the pre-existing GTECA-Apollo relationship by necessity, the law is nonetheless well-settled that even a *radical* modification of the pre-existing relationship (which clearly has not occurred in the instant case) would still not cause the tariff to be unlawful. GTE Direct Case, at 35 n. 15, and GTE Comments, at 2, 13, citing *American Broadcasting Co. v. Federal Communications Commission*, 643 F.2d 818, 819 (D.C. Cir. 1980) (*Armour Packing* applied even though customer's rates substantially increased and a material term of the pre-existing contract omitted from the tariff); *United Video, supra*, 49 FCC 2d 878, 878 (1974), *recon. denied*, 55 FCC 2d 516 (1975) (*Armour Packing* applied even in the case of a major revision in the pre-existing rate structure); *American Tel. & Tel. v. Federal Communications Commission*, 978 F.2d 727, 736 n. 12 (D.C. Cir. 1992), *cert. denied*, 113 S.Ct. 3020 (1993) (customer bound by tariff even though this works a "harsh result").

The bulk of Apollo's argument is a plea that the Commission reject years of precedent under *Armour Packing* and suddenly begin applying the "substantial cause" test in situations in which a carrier necessarily alters a pre-existing contract (*not* tariff) relationship. The Commission has already rejected this contention, finding that even a revision to long term service tariffs which had incorporated carrier-customer contracts does not alter the applicability of *Armour Packing*. *In re Midwestern Relay Co.*, 59 FCC 2d 477 (1976), *recon. denied*, 69 FCC 2d 409, 414 (1978), *aff'd sub nom. American*

*Broadcasting, supra.*⁵ Moreover, the substantial cause test is only "an aid in ascertaining whether newly-filed modifications to [the carrier's] long-term service tariffs are within the zone of reasonableness," and is not "an addition hurdle that [the carrier's] otherwise lawful tariff ha[s] to overcome." *Showtime Networks, Inc. v. Federal Communications Commission*, 932 F.2d 1, 6 (D.C. Cir. 1991). In any event, even if the substantial cause test were applicable (which it is not), there could be no more substantial a cause than the requirement to bring the parties into compliance upon expiration of the waiver. Thus, all of Apollo's contentions are wholly unavailing.

In the final analysis, Apollo's position is quite simple – and just as untenable. Apollo contends that *any* modification of the pre-existing contractual relationship – regardless of whether it is required by the Act and the Commission's Rules – is unjust and unreasonable, and hence unlawful. Simply stated, this is not now the law and never has been. *American Broadcasting*, 643 F.2d at 825-26 (in determining whether a carrier's tariff was lawful, the Commission properly refused to give any weight to the fact that the revised tariff conflicted with pre-existing carrier-customer contracts).

B. *Armour Packing* and Its Progeny Clearly Apply to the Instant Case.

Apollo's own brief leaves little doubt that the *Armour Packing* rule properly applies in the instant case. Despite its rhetorical attempts to suggest that *Armour Packing* is some how no longer good law (*e.g.*, Apollo Br., at 12⁶), Apollo's position now rests on the novel (and insupportable) argument that the Commission should read

⁵ As such, this is in no way a "case of first impression", as Apollo baldly contends. Apollo Opp., at i.

⁶ But see *MCI v. AT&T*, 114 S.Ct. at 2231; *Maislin Industries U.S. v. Primary Steel, Inc.*, 497 U.S. 116, 130-31 (1990).

*Sierra-Mobile*⁷ and the "substantial cause" test (which applies to tariff revisions) in tandem, and thereby reject *Armour Packing* and its progeny. This approach, while quite innovative, is utterly untenable under existing court and Commission precedent.⁸

The Supreme Court, the Courts of Appeals and the Commission have repeatedly and unequivocally reaffirmed and applied *Armour Packing* without hesitation. *E.g.*, *MCI v. AT&T*, 114 S.Ct. at 2231; *Maislin Industries*, 497 U.S. at 130-31; *American Broadcasting*, 643 F.2d at 825-26; *Farley Terminal Co., Inc. Atchison, T. & S. F. Ry. Co.*, 522 F.2d 1095, 1098-99 (9th Cir. 1975); *United Video, supra*; *In re Public Broadcasting Service*, 39 Rad.Reg. (P&F) 1516, 1530 (1977). While Apollo might disdainfully disparage reliance upon *Armour Packing* as "superficial literalism" (Apollo Opp., at 5), one can simply not deny the self-evident – and literal – application of *Armour Packing* to the instant case. Indeed, as previously noted (GTE Direct Case, at 27), this case is identical in all pertinent respects to *United Video*, except that GTECA has *not* proposed any "major revision" (49 FCC 2d at 878) to Apollo's rate structure. On the contrary, GTECA terminated those contracts where it had an unfettered right to terminate (*i.e.*, the Installation Agreement) and incorporated all of the provisions of the remaining contracts into the tariff, to the extent that this was consistent with the Act and the Commission's Rules. Thus, "the effective rates, practices, and regulations are those which appear in [GTECA's] tariff on file with the Commission and such tariff, the

⁷ *Federal Power Commission v. Sierra Pacific power Co.*, 350 U.S. 348 (1955); *United Gas Pipe Line Co. v. Mobile Gas Services Corp.*, 350 U.S. 332 (1955).

⁸ Having advanced this novel theory, Apollo appears to have abandoned its previous legal argument that *Sierra-Mobile* should be applied because no legitimate distinction exists between *Armour Packing* and *Sierra-Mobile* any longer. See GTE Comments, at 6; Apollo Br., at 13.

Commission's Rules, and the Act itself, are applicable as a matter of law, notwithstanding any conflicting provision appearing in an agreement executed by [GTECA] with [Apollo]." *United Video*, 49 FCC 2d at 880 and 55 FCC 2d at 516.

Apollo's attempts to distinguish *United Video* (Apollo Opp., at 13-14) are singularly unavailing. While the Commission did take note of a provision in the *United Video* carrier-customer contract which put the customer on notice of the ascendancy of any filed tariff, this provision is substantially similar to Paragraph 19 of the GTECA-Apollo Lease Agreement.⁹ More importantly, however, the Commission in *United Video* made absolutely clear that "in any event" – *i.e.*, irrespective the existence or non-existence of this particular feature of the pre-existing contract – the tariff *still* supplanted the contract, *even if* it worked a major revision of the customer's rates. *United Video*, 49 FCC 2d at 880.

As made clear in *Midwestern Relay*, Apollo must show that Transmittal Nos. 873 and 893 "clearly conflict[] with the Act or [the Commission's] Rules or orders."

"Petitioners argue [that] Midwestern's tariff revision is unlawful because it causes an increase in Midwestern's rates before the end of the five year period stated in its existing effective tariff. However, Petitioners have not shown why this requires rejection of this tariff revision. As stated above, we must reject a revision when it clearly conflicts with the Act or our Rules or orders. The fact that a tariff revision would conflict with an existing tariff does not, in itself, meet the that test. In fact, any tariff revision normally conflicts with an existing tariff when it seeks to change an existing provision. Accordingly, we find that Petitioners have not distinguished this case from *United Video* on any relevant grounds."

⁹ Paragraph 19 of the Lease Agreement states in pertinent part that:

"If the FCC claim[s] Title II jurisdiction over the service provided by [GTECA], [Apollo] shall be subject to the rates, terms and conditions such agency may impose."

Id., 69 FCC 2d at 414, *aff'd sub nom. American Broadcasting, supra*. Apollo has not even attempted to make this showing. All Apollo has done — as did the Petitioners in *Midwestern Relay* — is to complain that the tariff conflicted with a pre-existing service arrangement. This in no way removes the instant case from the teachings of *Armour Packing* and *United Video*. *Id.*

Finally, while Apollo asserts that the "Commission itself has eschewed" the limitation of *Bell Telephone*¹⁰ to carrier-to-carrier contracts *outside of the video sphere*,¹¹ Apollo still cannot deny that *with respect to video signal transport* the Commission has clearly understood (and consistently applied) the limitations of *Bell Telephone*, and thus properly relied upon *Armour Packing*. *United Video*, 55 FCC 2d at 517-18; *Midwestern Relay*, 69 FCC 2d at 415. Thus, in all respects, *Armour Packing* is plainly applicable in the instant case.

C. Apollo's Attempt to Have the Commission Reject Years of Precedent and Apply the Substantial Cause Test to the Instant Case Is Without Merit.

Apollo's weary advancement of the "substantial cause" test has but one purpose in this proceeding: to divert the Commission from its statutory responsibility to determine whether Transmittal Nos. 873 and 893 are just and reasonable. In Apollo's formulation, *any* tariff which deviates in *any* manner from the pre-existing agreements is unjust and unreasonable, and hence unlawful. While Apollo disingenuously claims that it "does not request that its earlier agreements be afforded a tariff-like status", it

¹⁰ *Bell Telephone Co. of Pennsylvania v. Federal Communications Commission*, 503 F.2d 1250 (3d Cir. 1974), *cert. denied* 422 U.S. 1026, *rehg. denied* 423 U.S. 886 (1975).

¹¹ Apollo Opp., at 9, *citing Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, 84 FCC 2d 445, 481-81 (1981).

nonetheless unambiguously contends that "if tariffs are to govern its future relationship with [GTECA], those tariffs [must] reflect the contract terms which the tariff proposes to supplant." Apollo Opp., at i. In other words, notwithstanding the requirements of the Act and the Commission's Rules, the Commission must reject any tariff unless it subsumes *all* of the pre-existing contractual provisions. Thus, in Apollo's view, GTECA was left with a devil's bargain on July 18: submit a tariff which failed to comply with federal mandate -- making Apollo happy, but which unfortunately would have been patently unlawful -- or submit a tariff which complied with the law -- thereby angering Apollo, and which Apollo asserts the Commission must reject. Such a Catch 22 is not the law -- under *Armour Packing* or otherwise -- and never has been.

The inapplicability of the substantial cause test is adequately addressed in GTE's Direct Case (at 37-38) and Comments (at 10-11). Indeed, as previously noted (GTE Comments, at 10-11), the Commission has already rejected attempts to apply substantial cause analysis under similar facts in *Midwestern Relay*. In *Midwestern Relay*, the pre-existing contractual terms were subsumed into a long term service tariff. (This is a substantial step beyond the instant case.) Nonetheless, even a revision of this tariff did not cause the Commission to deviate from the teaching of *Armour Packing*. Said the Commission: "Petitioners have not distinguished this case from *United Video* on any relevant grounds." *Midwestern Relay*, 69 FCC 2d at 414.

Even assuming, *arguendo*, that Apollo's formulation was correct, and that *Sierra-Mobile* and the substantial cause test *were* applicable in the instant case, Apollo still only contends that this means "that the terms of the proposed tariff be consistent with the parties' negotiated long-term arrangements, *in the absence of compelling public*

interest reasons for any differences." Apollo Opp., at 3 (emphasis added). And this is where Apollo's "substantial cause" argument fails utterly.

Apollo cannot deny – and, indeed, Apollo has never denied – that GTECA specifically designed the tariff in order to bring the parties into compliance with (1) Section 203(a) of the Act, (2) Section 63.54's carrier-user limitation, and (3) Section 61.38's pricing rules, as these requirements were applicable on the effective date of the tariff. Apollo's substantial cause argument rests on the premise that "the pre-existing contract[s] between [GTECA] and [Apollo] [are] legitimate." Apollo Opp., at 7. While there can be no doubt that this was the case prior to the expiration of the *Cerritos Order's* 5-year waiver, certain pre-existing contractual relationships between GTECA and Apollo clearly were *not* permissible as of the effective date of the tariff, July 18, 1994.¹² There can be no doubt that this rule proscribes the private contracts which GTECA's tariff properly supplants.¹³

¹² For example, without the waiver, GTECA and Apollo became subject to Section 63.54's carrier-user limitation on July 18, 1994.

¹³ Incomprehensibly, Apollo relies upon *CCI Cablevision v. Northwestern Indiana Telephone Co.*, 3 FCC Rcd 3096, 3097 (1988), *aff'd sub nom. Northwestern Indiana Telephone Co. v. Federal Communications Commission*, 872 F.2d 465 (D.C. Cir. 1989), *cert. denied* 493 U.S. 1035 (1990) (*NITCO II*) for the proposition that the Maintenance Agreement does not run afoul of Section 63.54 upon expiration of the waiver. Apollo Opp., at 24, n. 20. To the contrary, in *NITCO II* the Commission specifically found that "private contractual agreements between defendants for construction *and maintenance* with respect to Northwest's cable systems" violated Section 63.54 and were not exempt under the carrier-user exception. 3 FCC Rcd at 3097 (¶¶ 6, 11) (emphasis added). While GTECA may be permitted to contract out network maintenance functions (*see* Apollo Opp., at 23 ["the contracting out of such functions by carriers is not prohibited, and often occurs"]), this does not mean that, upon expiration of the waiver, *Apollo* could be GTECA's maintenance contractor in denigration of Section 63.54.

D. Apollo Has Not Disputed That the Tariff Substantially Improves Its Position Because Maintenance Is Now Provided Free of Charge.

While Apollo gratuitously criticizes the tariff submitted by GTECA in order to continue the provision of video signal transport after expiration of the waiver,¹⁴ Apollo has *never* suggested any alternative formulation which would place the parties in compliance with the Act or the Commission's Rules as of July 18, 1994. Rather, Apollo has merely repeated the incessant refrain that, unless GTECA's tariff subsumes *all* of the pre-existing contractual provisions, it must, *a fortiori*, be unlawful.

In reality, the tariff submitted by GTECA for Apollo substantially benefits Apollo. In fact, Apollo has not even bothered to dispute that supersession of the Maintenance Agreement significantly improves its monthly net income. See GTECA Direct Case, at 15 & n. 6. Moreover, while Apollo is experiencing a net savings in maintenance expenses, it still continues to recover in rates for maintenance expenses which it no longer bears. See GTE Comments, at 22-23. Under any formulation, this is hardly an unreasonable result for Apollo.

¹⁴ *E.g.*, Apollo Opp., at 9, n. 7 ("it is what the tariff filed must contain before it becomes effective that is at issue here").


CONCLUSION.

For the reasons stated hereinabove, and those more fully set forth in GTE's Direct Case and Comments previously submitted, Transmittal Nos. 873 and 893 are properly justified, reasonable and lawful.

Respectfully submitted,

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Certificate of Service

I, Ann D. Berkowitz, hereby certify that copies of the foregoing "GTE Rebuttal to Opposition and Reply Comments" have been mailed by first class United States mail, postage prepaid, on the 30th day of September, 1994 to all parties on the attached list.



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